IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-1319

UNITED STATES OF AMERICA,

Petitioner,

v.

UMBERTO JOSE CHAVEZ, *et al.*,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT GEORGE APODACA

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OPINION BELOW

The opinion of the Court of Appeals has now been reported at 478 F.2d 512. The opinion of the District Court is not yet reported.

STATEMENT

Respondent accepts the government's statement of the case, but reserved in the District Court the right to subpoena former Attorney General Mitchell on the issue of whether he "personally approved" the first request (R. 330), if that fact was essential to the decision.

SUMMARY OF ARGUMENT

The facts and issues in the present case are similar to those in *United States v. Giordano*, No. 72-1057, and we rely upon the Respondent Giordano's Brief in that case.

ARGUMENT

Counsel for the respondent Apodaca has been furnished the final draft of the Giordano Brief submitted for printing, and asks leave to adopt that brief on the basic issues in this case. For the sake of brevity, respondent will limit this brief to issues believed responsive to the Government's Chavez Brief.

The government proceeds on the assumption that both Courts below clearly *held* that the initialing of the Chavez memorandum by Attorney General Mitchell was a sufficient, "proper" authorization in full compliance with the provisions of Section 2516(1) (Pet. Brief p. 5-6). The District Court "assumed," for purposes of the decision, that the memorandum was an authorization (Appendix p. 103, Note 3). The Court of Appeals made the same assumption (Pet. App. A, p. 7a). In view of the Court's holding that its sufficiency was immaterial to the decision, no hearing was held on the issue of whether Attorney General Mitchell himself (1) "reviewed the request and the facts and circumstances detailed therein," and (2) determined that probable cause existed, and (3) that normal investigative procedures reasonably appear to be unlikely to succeed if tried. See "Wilson Letters," (App. pp. 11-12, 50-51). In fact, Attorney General Mitchell in his affidavit (App. 93) does *not* state that he did any more than approve the requests.

It is apparent that the district judge who authorized the wiretaps relied upon the accuracy and integrity of the

court officers who appeared before him, and upon the written representations contained in the applications and their attachments. The Court had a right, under the statute, to know *who* made the important decision to seek authority to invade a citizen's privacy. Without the assurances that Will Wilson, the Assistant Attorney General in charge of the Criminal Division, had *personally* reviewed the file and determined that this *particular* case justified the intrusion proposed, the authorizing court may well have required a greater showing of need. Wilson's position, reputation, and integrity could have influenced the district judge in his action. So far as the district judge knew, the threshhold decision to authorize application was personally made by a responsible high-ranking Justice Department officer, "specially designated" by the Attorney General himself to act in his behalf, and who was aware of the policy considerations governing the extent and scope of such intrusions.

The government characterized this apparent difficulty as "at worst . . . [a] careless clerical dictating of form memoranda" (Government's Brief, *United States v. Giordano*, p. 71). It argues that since the lines of authority are clear (an assertion to which respondent does not accede) after the fact, or "ascertainable by interrogatories and testimony" (*Ibid*, p. 71), the confusion has been "easily resolved."

Courts must be able to trust the bald assertions of attorneys appearing before them. It should not be necessary to take "interrogatories" or "testimony" to determine the truth or falsity of representations made in applications for wiretap orders, search warrants, and the like. The applications in this case were not "inartful" or "confusing" but stated clearly and unequivocally that Will Wilson, pursuant to "special designation" authorized

by statute, had made the required determinations. This allegation was accepted at face value by the District Judge. It was not true. We know *now* that Will Wilson never even saw the application or the file, nor did he make any determinations as stated in his letter. (Affidavit, Appendix 85-86, 89-90).

It was this "guessing game" which the Court below condemned. Perhaps were this an adversary proceeding, subject to the challenge of opposing counsel, the truth could be ascertained through the hearing process before the important decision to order an interception was made. Where, however, the proceedings are *ex parte*, often under the most urgent of circumstances, courts justifiably depend upon the accuracy and reliability of the prosecuting officials. In this case, it is obvious that the reliance was misplaced.

While it is clear, as the Court below held, that the Congress and the public had a statutory right to be informed of the identity of the authorizing officer, the district court's right to know is imperative in our judicial system. Whether the deception was deliberate or unintentional, it had the effect of misleading the district judge, resulting in the entry of an order not in compliance with the requirements of Section 2518(1)(a) and (4)(d).

As an example of a similar approach in this very case, the government states that the determinations of probable cause and necessity made by the district judge were based upon sworn affidavits "whose accuracy and veracity is unchallenged" (Pet. Brief, p. 8).

The trial judge did not reach the pending motions[1] (R. 159-197) attacking the sufficiency of the affidavits

[1] The trial court treated the authorization question first, and did not proceed to examine the other issues raised in the suppression motion.

and failure to minimize, since the preliminary authorization procedure was found defective. This issue, then is not before this Court nor was it before the Court of appeals. This does not mean, however, that the "accuracy and veracity [of the affidavits] is unchallenged."

The affidavits were attacked on the grounds that:

1. They failed to demonstrate a need for wiretapping (R. 178);

2. They failed to particularly describe the communications sought to be intercepted (R. 182);

3. They failed to show adequate probable cause to support the order, since (R. 183);

a. Records were illegally obtained (R. 184);

b. Reliability of anonymous informants was not shown (R. 185);

c. The time of receipt of certain information was not shown (R. 186);

d. Most of the information was too "stale" to support probable cause (R. 187);

While technically, at this posture of the case, the "accuracy and veracity" of the affidavits is "unchallenged," their sufficiency is certainly under attack. Additionally, had a hearing been held upon that aspect of the motion to suppress, an attack upon the accuracy would have been made (R. 330). To broadly state that the orders were based upon "unchallenged" affidavits is certainly misleading.

If the determination by the district judge to authorize the wiretaps was based upon the erroneous assumption that the strict statutory requirements had been complied with, it is difficult to see how such findings overcame the faulty premise underlying them. This is the same "bootstrap technique" rejected by the Court of Appeals in

Giordano, Pet. App. A, p. 18a, and in the companion case to *Chavez, United States v. King*, No. 72-1320, pending, *King* Pet. App. A, p. 28 (Reported at 478 F.2d 494).

CONCLUSION

The threat of suppression is the statutory sanction for non-compliance with the strict provisions of Title III, to implement a Congressional policy limiting wiretapping to carefully circumscribed conditions. It reflects the "deep-seated uneasiness and apprehension that this capability [to wiretap] will be used to intrude upon cherished privacy of law abiding citizens." *United States v. United States District Court*, 407 U.S. 297 (1972). The decision below is correct, and should stand.

Dated: September 24, 1973

Respectfully submitted,

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